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LATHEEFA BEEBI KOYA & ANOR

v.

SURUHANJAYA PENCEGAHAN RASUAH MALAYSIA & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ZALEHA YUSOF J
[JUDICIAL REVIEW NO: R1-25-94-04-2012]
30 JANUARY 2013

C

ADMINISTRATIVE LAW: *Judicial Review - Certiorari - Application for - Lawyers accompanied client for recording of statement by Malaysian Anti-Corruption Commission - Lawyers issued notices under s. 30(1)(a) of Malaysian Anti-Corruption Commission Act 2009 for statements to be*
D *recorded - Whether issuance of notices was decision susceptible to court's reviewing powers - Whether issuance of notices affected rights and obligations of lawyers - Whether directly interfered with exercise of duty to client - Whether lawyers entitled to make application for judicial review*

E ***LEGAL PROFESSION:*** *Professional privilege - Communication between solicitor and client - Lawyers accompanied client for recording of statement by Malaysian Anti-Corruption Commission - Lawyers issued notices under s. 30(1)(a) of Malaysian Anti-Corruption Commission Act 2009 for statements to be recorded - Whether lawyers interfered with*
F *interview with client - Whether lawyers' presence impeded investigation - Whether privileged information between solicitor and client protected - Malaysian Anti-Corruption Commission Act 2009, s. 46*

STATUTORY INTERPRETATION: *Definitions - "Decision" - "Decision" in O. 53 r. 4 of the Rules of Court 2012 - Whether notice*
G *under s. 30(1)(a) of Malaysian Anti-Corruption Commission Act 2009 a "decision" - Whether affected rights and obligations - Whether subject to judicial review*

Datuk Shamsubahrin bin Ismail ('client') was summoned by the
H Malaysian Anti-Corruption Commission ('first respondent') to give statement under s. 30 of the Malaysian Anti-Corruption Commission Act 2009 ('the Act') to assist in an investigation of an offence under s. 16(b)(B) of the Act. The applicants, advocates and solicitors of the High Court of Malaya, who had acted for the
I client accompanied him to the first respondent's premises and

insisted to be present throughout the recording of the statement. The applicants were allowed to do so but were informed that it was possible for their statements to also be recorded, to which the applicants refused. Hence, the first respondent issued notices under s. 30(1)(a) of the Act ('the notices') requiring the applicant to be present at the first respondent's premises and to give their statements. The applicants were also notified that failure to comply with the said notices might subject them to the punishment of a fine or imprisonment or both. Not happy with the respondents' action, the applicants sought reliefs for, *inter alia*: (i) an order of *certiorari* to quash the notices; (ii) declaration that the notices were *ultra vires* and unlawful; and (iii) declaration that the first respondent did not have the power to take statements or testimony of lawyers who appear with their client who had been summoned to give statements to the first respondent. The main issue for determination was whether the issuance of the notices was a decision which entitled the applicants to make this application.

Held (allowing applicants' application):

(1) For a decision to be susceptible to the court's reviewing powers, there must first be a decision and that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which had been permitted to enjoy. Also, if there is no other remedy opened to the applicant or, where the issue is a matter of law, it is subject to judicial review (*Council of Civil Service Unions v. Minister for the Civil Service*, refd). (paras 15 & 19)

(2) On the facts, there was no doubt that the issuance of the said notices affected the rights of the applicants and also their obligation as lawyers representing their client. It was a direct interference with the exercise of their duty to their client. There was no remedy opened to the applicants as the non-compliance with the notice was clearly an offence under s. 30 of the Act as clearly shown in sub-ss. (6) and (10) of s. 30. (para 19)

(3) Further, the issue as to whether the respondents could issue such notices to the applicants under the circumstances of the case was an issue of law. (para 20)

(4) The onus of proving to the satisfaction of the court that the appellants' presence would impede the investigation fell on the respondents and the respondents had not shown it. There was no evidence that the applicants had interfered with the interview of their client. In the circumstances, there was no logic for the respondents to order the applicants to attend to be examined in relation to the investigation, in the pretext of assisting the investigation, when they were merely lawyers acting and representing their client. (para 21)

(5) Section 46 of the Act protects the privileged information between solicitor and client, in that, it requires an application to be made to a judge of the High Court before an advocate and solicitor could be asked to disclose information available to him, but the information excludes privileged information between solicitor and client. Further, Malaysia, having adopted the United Nations Basic Principles on the Role of Lawyers, must give due respect and adhere to it. Therefore, lawyers must be protected from any form of intimidation and interference in the performance of their obligation to advice and act for their clients. (paras 22, 23, 25 & 26)

(6) What is "decision" in O. 53 r. 4 of the Rules of Court 2012 depends on the facts of each case. In the present case, the notice is a "decision" which was subject to judicial review because the applicants would be left with no choice but to comply with it. It was clear that the notice affected the applicants by interfering with their rights and obligations to act as lawyers for their client. In the circumstances, the issuance of the notice was clearly an act of intimidation and abuse of powers on the part of the respondents as there was no legal basis for the issuance of the notices and hence, the issuance of the notices was void and unlawful. (paras 27 & 28)

Case(s) referred to:

Ahmad Azam Mohamed Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors [2004] 4 MLJ 86 ***(refd)***

Baldwin & Francis Ltd v. Patents Appeal Tribunal [1959] AC 663 ***(refd)***

Chin Shui Lan v. Directors of Lands & Surveys [1995] 4 CLJ 358 HC ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Hashim Saud v. Yahaya Hashim & Anor [1977] 1 LNS 32 FC ***(refd)***

Hj Salleh Jafaruddin v. Datuk Celestine Ujang & Ors [1986] 2 CLJ 209; [1986] CLJ (Rep) 142 SC ***(refd)***
R v. London Borough of Hillingdon, ex parte Royco Homes Ltd [1974] 2 APP ER 643 ***(refd)***
R v. Sloan [1990] 1 NZLR 474 ***(refd)***
Ridge v. Baldwin [1964] AC 40 ***(refd)***

Legislation referred to:
Federal Constitution, art. 5
Malaysian Anti-Corruption Commission Act 2009, ss. 16(b)(B), 30(1)(a), (6), (10), 46
Rules of Court 2012, O. 53 r. 4

Other source(s) referred to:
MP Jain, *Administration Law in Malaysia and Singapore*, 3rd edn, p 665

For the appellants - Sivarasa Rasiah (Muhammad Afiq Muhamad Noor with him); M/s Daim & Gamany
For the respondents - Effandi Nazila Abdullah; SFC

Reported by S Barathi

JUDGMENT

Zaleha Yusof J:

[1] Both the applicants are advocates and solicitors of the High Court of Malaya. They acted for one Datuk Shamsubahrin bin Ismail (their client) who had been summoned by the first respondent to give statement to assist in investigation of an offence under s. 16(b)(B) of the Malaysian Anti-Corruption Commission Act 2009 ('Act 694') against one Datuk Seri Dr Mohamad Salleh bin Ismail, the Executive Director of National Feedlot Corporation (NFC). The order to give statement was pursuant to s. 30 of Act 694.

[2] The applicants had on 19 March 2012, accompanied their client to the first respondent's premises and insisted to be present throughout the recording of the statement, on the instruction of their client. According to the affidavit in reply of the respondents, as the situation then was tense and with the presence of reporters, the applicants were allowed to accompany their client during statement taking but the applicants were informed by the first respondent of the possibility that their statements themselves would also be recorded.

[3] The applicants, when approached, had refused to give any statement to the first respondent. Hence, the first respondent through the third respondent, had on the same day, issued notices under s. 30(1)(a) of Act 694 requiring the applicant to be present at the first respondent's premises on 23 March 2012 and to give statements, just like their client. They were notified that failure to comply to the said notices may subject them to the punishment of a fine or imprisonment or both.

[4] Not happy with the respondents' action, the applicants now seek for the following reliefs:

(a) An order of *certiorari* to quash the notices (hereafter referred as "the said notices") under s. 30(1)(a) of Act 694 dated 19 March 2012;

(b) Declaration that notices under s. 30(1)(a) of Act 694 dated 19 March 2012 are *ultra vires* and unlawful;

(c) Declaration that the first respondent does not have the power to take statements or testimony of lawyers who appear with their client who has been summoned to give statements to the first respondent;

(d) General damages and exemplary damages; and

(e) Such further reliefs that the court deems fit.

Issue

[5] The main issue here is whether the issuance of the said notices is a decision which entitled the applicants to make this application.

The Applicants' Case

[6] Learned counsel for the applicants submits that in the case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[7] He also quotes the case of *R v. Sloan* [1990] 1 NZLR 474, wherein Justice Hardie Boys said:

> Secondly, it is not every decision made under statutory authority that is subject to review. A decision must go beyond what is merely administrative or procedural or of a function rather than a power. Quite plainly, the conclusions reached by the inspectors here are of this kind and so are not reviewable ...

[8] Learned counsel for the applicants further submits that the third respondent's decision to issue such notices goes beyond the administrative or procedural or the exercise of a function of the first respondent and is a clear violation of art. 5 of the Federal Constitution on the right to legal counsel.

The Respondents' Case

[9] The learned Senior Federal Counsel appearing for the respondents on the other hand submits that there was no decision here as the matter was still at investigation stage. He quotes the case of *Hj Salleh Jafaruddin v. Datuk Celestine Ujang & Ors* [1986] 2 CLJ 209; [1986] CLJ (Rep) 142; [1986] 2 MLJ 412 where the Supreme Court held that:

> The proceedings of the Committee of Privileges of the Dewan Undangan Negeri, Sarawak, when acting as an investigating body are not amenable to an order of prohibition and the learned Judge was right in refusing the application under Order 53 Rule 1 of the Rules of the High Court, 1980.

[10] He also quotes *Sloan*'s case (*supra*) and the same statement of Justice Hardie Boys as follows:

> Secondly, it is not every decision made under statutory authority that is subject to review. A decision must go beyond what is merely administrative or procedural or of a function rather than a power. Quite plainly, the conclusions reached by the inspectors here are of this kind and so are not reviewable. To hold otherwise would, as Mr. Neave submitted, open up the investigative process of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament ...

[11] Also in *Ahmad Azam Mohamed Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86, the High Court, the learned Senior Federal Counsel argues had held:

> To hold such a process of inspection reviewable would open up the investigation process of all enforcement agencies to constant judicial review. I have no valid reason to open the floodgate ...

[12] The learned Senior Federal Counsel further submits that the notice given is also not a final determination but merely a directive to appear for the purpose of assisting in investigation.

Findings Of Court

[13] The relevant provisions of s. 16(b)(B) of Act 694 and s. 30 of the same are as follows:

> 16. Any person who by himself, or by or in conjunction with any other person:
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> (a) ...
>
> (b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person.
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> any gratification as an inducement to or a reward for, or otherwise on account of:
>
> (A) ...
>
> (B) any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned.
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> commits an offence.
>
> 30. Power to examine persons.
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> (1) An officer of the commission investigating an offence under this Act may:
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> (a) order any person to attend before him for the purpose of being examined orally in relation to any matter which may, in his opinion, assist in the investigation into the offence;

(b) order any person, to produce before him, within the time specified by such officer, any book, document, records, accounts or computerized data, or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation into the offence;

(c) by written notice order any person to furnish a statement in writing made on oath or affirmation setting out therein all such information which may be required under the notice, being information which, in such officer's opinion, would be of assistance in the investigation into the offence, within the time specified by such officer; and

(d) order any person to attend before him for the purpose of having his handwriting or voice sample taken.

(2) …

(3) A person to whom an order has been given under paragraph (1)(a) shall:

(a) attend in accordance with the terms of the order to be examined, and shall continue to attend from day to day where so directed until the examination is completed; and

(b) during such examination, disclose all information which is within his knowledge, or which is available to him, in respect of the matter in relation to which he is being examined, and answer any question put to him truthfully and to the best of his knowledge and belief, and shall no refuse to answer any question on the ground that it tends to incriminate him or his spouse.

(4) A person to whom an order has been given under paragraph (1)(b) shall not conceal, destroy, alter, remove from Malaysia, or deal with, expend, or dispose of, any book, document, record, account or computerized data, or article specified in the order, or alter or deface any entry in any such book, document, record, account or computerized data or cause such act to be done, or assist or conspire to do such act.

(5) A person to whom a written notice has been given under paragraph (1)(c) shall, in his statement, furnish and disclose truthfully all information required under the notice which is within his knowledge, or which is available to him, and shall not refuse to furnish or disclose the information on the ground that it tends to incriminate him or his spouse.

(6) A person to whom an order or a notice is given under subsection (1) shall comply with such order to notice and with subsections (3), (4) and (5), notwithstanding any written law or rule of law to the contrary.

(7) Where any person discloses any information or produces any book, document, record, account or computerized data or article pursuant to subsections (1), (3) and (5), neither the first-mentioned person, nor any other person on whose behalf or direction or as whose agent or employee the first-mentioned person may be acting, shall, on account of such disclosure or production, be liable to any prosecution, except a prosecution for an offence under section 27, for any offence under or by virtue of any written law, or to any proceedings or claim by any person under or by virtue of any law or under or by virtue of any contract, agreement or arrangement, or otherwise.

(8) An officer of the commission examining a person under paragraph (1)(a) shall record in writing any statement made by the person and the statement so recorded shall be read to and signed by the person, and where such person refuses to sign the record, the officer shall endorse thereon under his hand the fact of such refusal and the reasons therefore, if any, stated by the person examined.

(9) The record of an examination under paragraph (1)(a), or a written statement on oath or affirmation made pursuant to 1(c), or any book, document, record, account or computerized data, or article produced under paragraph (1)(b) or otherwise in the course of an examination under paragraph (1)(a), or under a written statement on oath or affirmation made pursuant to paragraph (1)(c), or record of examination of sample taken under paragraph (1)(d) shall, notwithstanding any written law or rule of law to the contrary, be admissible in evidence in any proceedings in any court:

(a) for an offence under this Act; or

(b) for the forfeiture of property pursuant to section 40 or 41,

regardless whether such proceedings are against the person who was examined, or who produced the book, document, record, account or computerized data, or article, or who made the written statement on oath or affirmation, or against any other person.

(10) Any person who contravenes this section commits and offence.

[14] I have scrutinised this application and submissions made by the parties very carefully.

[15] As submitted by learned counsel for the applicants, the House of Lords in *Council of Civil Service Union*'s case (*supra*) had held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy. At p. 949/F-H Lord Diplock said:

> To qualify as a subject matter for judicial review, the decision must have consequences which affects some people (or body of people) other than the decision - maker, although it may affect him too. It must affect such person either:
>
> (a) by altering rights and obligations of that person which are enforceable by or against him in private law;
>
> (b) by depriving him of some benefits or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he had received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[16] In *Baldwin & Francis Ltd v. Patents Appeal Tribunal* [1959] AC 663, Lord Denning had said that where the applicant is a party grieved who has no other remedy, the court will grant the order of *certiorari ex debito justitiae*.

[17] Our court in *Chin Shui Lan v. Directors of Lands & Surveys* [1995] 4 CLJ 358 had followed the House of Lords' decision in *Ridge v. Baldwin* [1964] AC 40 that judicial review lies against any person or body of person charged with any public duty.

[18] In *R v. London Borough of Hillingdon, ex parte Royco Homes Ltd* [1974] 2 All ER 643, the applicants moved for, *inter alia*, an order of *certiorari* to bring up and quash the grant of the planning permission granted by a local planning authority, on the grounds that the four conditions attached to the permission were *ultra vires* the planning authority. The court held that *certiorari* would lie in appropriate cases to control the exercise by a local planning authority of its jurisdiction under the planning Acts, ie, in clear cases where the issue was a matter of law and the matter of law appeared on the face of the record. It was immaterial that the planning authority was not a body which had the duty to act judicially, for *certiorari* would issue to anybody which had jurisdiction to determine the rights of subject whether or not it was required to act judicially.

[19] What I am trying to show by citing all those authorities is that case law has shown that if the decision affects the aggrieved party by either altering his rights or obligation, then the decision is qualified for judicial review. Case law also has shown that if there is no other remedy opened to the applicant, the applicant has every right to make this application. Also where the issue is a matter of law, it is subject to judicial review. In this case, I am of the opinion that there is no doubt that the issuance of the said notice affects the rights of the applicant and also their obligation as lawyers representing their client. As learned counsel for the applicants had put it, it is direct interference with the exercise of their duty to their client. There is no remedy opened to the applicants as the non-compliance with the notice is clearly an offence under that particular s. 30. This is clearly shown in sub-ss. (6) and (10) of that s. 30.

[20] On top of that, I also feel that the issue whether the respondents can issue such notices to the applicants under the circumstances of the case, is issue of law.

[21] If we look at the affidavits filed in this instance by the parties, other than the undisputed fact that the applicants were present during the interview of their client, there is no evidence

that they had in fact interfered with the interview. The onus of proving to the satisfaction of the court that their presence would impede investigation in my opinion falls on the respondents; and the respondents have not shown this. Refer to Federal Court decision in *Hashim Saud v. Yahaya Hashim & Anor* [1977] 1 LNS 32; [1977] 2 MLJ 116. I do not see any logic of the respondents later ordering the applicants to attend to be examined in relation to the investigation, in the pretext of assisting the investigation, when they are merely lawyers acting and representing their client. How would they be expected to assist the investigation when s. 46 of the Act itself protects the privileged information between solicitor and client?

[22] The said s. 46 of Act 694 read as follows:

> 46. (1) Notwithstanding any other written law, a Judge of the High Court may, on application being made to him in relation to an investigation into any offence under this Act, order an advocate and solicitor to disclose information available to him in respect of any transaction or dealing relating to any property which is liable to seizure under this Act.
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> (2) Nothing in subsection (1) shall require an advocate and solicitor to comply with any order under that subsection to the extent such compliance would disclose any privileged information or communication which came to his knowledge for the purpose of any pending proceedings.

[23] As can be seen, even if s. 46 requires application to be made to a judge of the High Court before an advocate and solicitor can be asked to disclose information available to him but the information excludes privileged information between solicitor and client.

[24] We must always bear in mind that the independence of lawyers is a fundamental principle recognised internationally. Lawyers play a key role in the administration of justice and protection of human rights.

[25] Talking about the role of lawyers, it is pertinent to note that amongst instruments unanimously adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana from 27 August to 7 September 1990 was the United Nation Basic Principles on the Role of Lawyers.

Malaysia was represented at the said Congress. Although the basic principles are not legally binding they should be held in high regard and be given due respect; and as one of its preamble states, be taken into account by Government. Of relevance to the instance are the following articles of the said basic principles:

> 16. Government shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference,; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
>
> 17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
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> 22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

[26] After adopting the basic principles it is only right that Malaysia gives due respect and adheres to it. Hence, I am of the view that lawyers must be protected from any form of intimidation and interference in the performance of their obligation to advise and act for clients. In addition, the fundamental principle of solicitor-client confidentiality which lawyers are bound must be preserved.

[27] To me, what is "decision" in O. 53 r. 4 of the Rules of Court 2012 depends on the facts of each case. In this instance, I am of the view that the notice is a "decision" which is subject to judicial review because the applicants will be left with no choice but to comply with it as the non compliance of it will result with the applicants committing an offence under s. 30 of Act 694. It is clear the notice does affect the applicants by interfering their rights and obligations to act as lawyers for their client. As MP Jain in *Administration Law in Malaysia and Singapore*, 3rd edn. at p. 665 put it aptly, today, *certiorari* goes not only to a body discharging a quasi-judicial function, but to any body determining the rights of the people. The modern trend is that wherever there is power to determine questions affecting the rights of persons, there is a duty to act judicially and such a determination is subject to *certiorari*.

[28] I have no doubt that in the circumstances of the case, the issuance of the notice is clearly an act of intimidation and abuse of powers on the part of the respondents. Their client was called to assist in the investigation of an offence against the executive director of NFC. The applicants are just lawyers for their client. Then how could now they be asked to assist in the investigation into the said offence? To me there is no legal basis for the issuance of the notice. Again, I reiterate that the issuance of the notice is clearly an act of intimidation and abuse of powers on the part of the respondents and therefore the issuance of the notice is void and unlawful.

Conclusions

[29] Based on the above, I agree with the applicants and therefore allow this application in prayer 1(a), (b) and (c).